SOUTHERN ESTATES SDN. BHD & ANOR.

v.

TRACTORS MALAYSIA BHD.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DATO' SULEIMAN BIN HASHIM J
[CIVIL SUIT NO. 190 OF 1978]
10 OCTOBER 1994

***CONTRACT**: Fraudulent misrepresentation - Plaintiffs purportedly entering into hire purchase agreements with defendants - Plaintiffs claiming agreements were in fact hire agreements - Plaintiffs seeking rescission of agreements and damages - Reliance on three letters written by defendants - Letters addressed to Southern Timber Contractor and not to 1st plaintiff - 2nd plaintiff proprietor of both companies - Whether separate entities - Whether plaintiffs' allegation proved.*

***PRACTICE & PROCEDURE**: Plaintiffs filing suit for inter alia rescission of agreements entered into with defendants for fraudulent misrepresentation - Plaintiffs also seeking order to set aside judgments entered against plaintiffs - 2nd plaintiffs' previous suit to set aside judgment unsuccessful - Defendants raising issue of cause of action estoppel and res judicata - Whether applicable.*

On 1 October 1967 the plaintiffs entered into 19 agreements for the supply of logging equipment by the defendant on the alleged representation of the defendants that the agreements were hire purchase agreements. Sometime in mid 1977, the plaintiffs were advised by their solicitor that the agreements were in fact hire agreements afterwhich the plaintiffs filed the present suit claiming for rescission, damages and an order to set aside judgments entered by the defendants against the 1st plaintiff in suit no.189 of 1969 and the 2nd plaintiff in suit no.190 of 1969 on the basis of fraudulent misrepresentation. In support of the allegation of fraud the plaintiffs relied on 3 letters written by the defendants (PBD8, PBD11 & PBD13), all signed by the defendants' sales manager. Also tendered were 5 of the 19 agreements, admitted as P1 to P5, in which the equipment mentioned in the said 3 letters were also mentioned in P1, P2, P3 and P5.

At the outset, Counsel for the defendants submitted that the plaintiffs were estopped from pursuing the present suit for cause of action estoppel and *res judicata* as the 2nd plaintiff had on 16 May 1972 made an unsuccessful attempt to set aside the judgment in suit no.190 of 1969 *vide* suit 199 of 1972.

Counsel for the defendants contended that of the 3 letters only PBD8 and PBD13 referred to "Hire Purchase Terms" and both were addressed to Southern Timber Contractor, not the 1st plaintiff, whereas PBD11 which was addressed to the 1st plaintiff did not refer to any hire purchase. Counsel also pointed out that PBD8 referred to a discussion between the defendants' sales manager and staff of the 2nd plaintiff in the absence of the 2nd plaintiff. The 2nd plaintiff replied that as he was the sole proprietor of Southern Timber Contractor as well as a partner of the 1st plaintiff, the agreements between the two companies and the defendants could be deemed to have been between him and the defendants. Furthermore, the 2nd plaintiff claimed that the discussion between his staff and the defendants' sales manager was just to confirm the terms agreed between himself and the sales manager at an earlier meeting.

The 2nd plaintiff admitted having knowledge of the 3 letters since 1967 but failed to inform his solicitors representing him in suit nos.189 & 190 of 1969 and 199 of 1972 about the said letters in relation to the 19 agreements and while denying that he knew the agreements were hire agreements when he signed them, the 2nd plaintiff gave two conflicting versions of the signing of the agreements. The 2nd plaintiff had also promised to settle payments for suit nos.189 & 190 of 1969 in reply to a letter from the defendants' solicitors requesting for payment in reference to the "hire agreements".

The defendants submitted there was no case to answer.

Held:

[1] *Res judicata* if applicable was only applicable to suit no. 190 of 1969. In the present case there was no *res judicata* and there was an issue to be tried on allegation of fraud.

[2] With respect to the evidence in its totality, the plaintiffs' allegation of fraudulent misrepresentation against the defendants' is 2nd plaintiff's mere averment, oral evidence, vacillatory at times, not borne out and not supported by PBD8, PBD11 and PBD13, plaintiffs' own documentary evidence.

[3] It may be well for the 2nd plaintiff to say he is the 1st plaintiff and the 1st plaintiff is him, to say he is Southern Timber Contractor and Southern Timber Contractor is him, he is also the sole proprietor of a Tatau Timber Company and by the same argument to say he is Tatau Timber Company and Tatau Timber Company is him, but 2nd plaintiff must know that the 1st plaintiff and Tatau Timber Company are a separate entity. With respect, a person, firm or company or any party dealing with the 2nd plaintiff should not have to be faced with any fluid or erratic stance by the 2nd plaintiff. A party particularly in the business community must know with certainty with whom the party is dealing with, negotiating with and finally entering into an agreement with.

[4] The plaintiffs' have not discharged the burden of proof and with insufficient evidence the plaintiffs' must fail. The defendants' submission of no case to answer is accepted.

[Plaintiffs' suit dismissed with costs]

Cases referred to:

Tractors Malaysia Bhd v. Southern Estates Sdn. Bhd. & Anor. [1984] 1 MLJ 118 FC
Arnold & Others v. National Westminister Bank Plc [1991] 3 AER 41 HL
Saminathan's case [1981] 1MLJ 121 PC
International Times [1980] 2 MLJ 86 FC

Legislation referred to:

Contracts Act 1950, s. 17

Other source referred to:

Bullen and Leake and Jacob's, 12th Edn., 1975, p. 449

For the plaintiffs - Teh Boon Eng, (Mohd. Anuar bin Datuk Abdul Ghani. with him)
For the defendants - Norbert Yapp, (Nadia Fong & Nora Fung with him)

JUDGMENT

Suleiman Bin Hashim J:

In this suit plaintiffs allege fraud against defendants in respect of 19 agreements one for each logging equipment, supplied by defendants to plaintiffs, entered into between plaintiffs and defendants, dated 1 October 1967. Plaintiffs allege that defendants fraudulently misrepresented that the equipment were to be on hire purchase but were not, the agreements were

not hire purchase agreements but were hire agreements. Plaintiffs seek, among other things, rescission of the 19 agreements, damages and for an order that judgments entered by defendants against first plaintiffs in suit 189 of 1969 and against second plaintiff in Suit 190 of 1969 and all subsequent orders and execution issued thereunder be set aside. The judgment in suit 189 of 1969 was for a sum lesser than claimed, admitted by first plaintiffs, the judgment in Suit 190 of 1969 was for a sum lesser than claimed, admitted by second plaintiff. Suit 189 of 1969 dated 28 October 1969 was by defendants against first plaintiffs in respect of the same 19 agreements. Suit 190 of 1969 dated 28 October 1969 was by defendants against second plaintiff in respect of a guarantee agreement dated 21 November 1968 given by second plaintiff to defendants for the balance payments due under the 19 agreements.

On 16 May 1972 second plaintiff filed suit 199 of 1972 against defendants. second plaintiff sought, among other things, to set aside the judgment in suit 190 of 1969, a declaration that the guarantee agreement dated 21 November 1968 was null and void for lack of consideration. By summons-in-chambers dated 21 June 1972 defendants applied to have suit 199 of 1972 set aside. On 6 July 1972 Lee Hun Hoe, J, (as he then was) granted the application. Second plaintiff appealed to the Federal Court which reversed the judgment of Lee Hun Hoe, J. Defendants appealed to the Privy Council which reversed the judgment of the Federal Court and restored the judgment of Lee Hun Hoe, J.

Mr. Norberts Yapp's Submission on "Cause of Action Estoppel/Res Judicata":

Mr. Norbert Yapp, leading Counsel for defendants, rely on the judgment of Lee Hun Hoe, J., in suit 199 of 1972 restored by the Privy Council and submitted that in the present suit arises cause of action estoppel and *res judicata* and plaintiffs are now estopped, *res judicata* is applicable, from pursuing the present suit.

On this issue of cause of action estoppel/*res judicat*a relied upon by defendants it is relevant that by summons-in-chambers dated 29 June 1978 defendants applied to have the present suit set aside as being "frivolous and vexatious and an abuse of the process of the Court" and "plaintiffs are estopped from taking the present action." On 26 January 1979 Datuk B.T.H. Lee, J., (as he then was)dismissed the application, costs in the cause. B.T.H. Lee, J., after going through numerous authorities, said:

Cause of Action - Estoppel

Civil suit No. 199 of 1972 which was dealt with by the Privy Council does not in my view gives rise to an estoppel by ***res judicata*** to the present suit because the cause of action in that suit and the present is not the same. In any event civil suit No. 199 of 1972 if *res judicata* is only applicable to civil suit no. 190 of 1969.

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Lee Hun Hoe, J's judgment, Counsel for plaintiffs say, is not authority for setting aside judgment on account of fraud. That was not the issue in that case. The question of fraud was not argued before him and cases on fraud were not cited to him. Nor was Vol. 22, **Halsbury's Laws** referred to him. What Lee Hun Hoe, J., was reported to have said is this:

> All the matters in this action could have been raised by plaintiff previously in his defence but he elected not to do so. There is no question of new evidence being discovered which could not have been obtained in the previous proceedings.....

Counsel for the plaintiffs submit that what the Judge said is not authority for setting aside judgment on account of fraud. That was not the issue in that case. The question of fraud was not argued before him or were the cases of fraud cited to him. Nor was Vol. 22 **Halsbury's Laws** referred in argument.

> At the end of the day, however, his remarks in the judgment must necessarily be taken as *obiter dicta*, and that when the occasion next arise they may be considered on their merits.
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> On the materials submitted before me, I am of the view that the plaintiffs have complied with the requirements as set out in *Birch v. Birch* [1902] p. 130. I hold that there is no ***res judicata*** and that there is an issue to be tried on allegation of fraud.
>
> The summons to strike out is accordingly dismissed and costs hitherto incurred will be costs in the cause.

Defendants did appeal against the judgment of B.T.H. Lee, J, to the Federal Court which dismissed the appeal with costs as the "appeal filed was clearly well out of time..... no special grounds for granting the extension of time to file notice of appeal." *Tractors Malaysia Bhd v. Southern Estates Sdn. Bhd. & Anor.* [1984] 1 MLJ 118 FC.

With utmost respect I agree with the judgment of B.T.H. Lee, J., "*res judicata* if applicable is only applicable to Civil suit no.190 of 1969.... I hold that there is no *res judicata* and that there is an issue to be tried on allegation of fraud", *a fortiori* where there is allegation of fraud, as in *Arnold & Others v. National Westminister Bank Plc* [1991] 3 AER 41 HL cited by Mr. Yapp himself, if I may quote at 46:

> It is appropriate to commence by noticing the distinction between cause of action estoppel and issue estoppel. Cause of action estoppel arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment.....

Plaintiffs' Allegation of Fraud, Fraudulent Misrepresentation against Defendants

Plaintiffs rely on three letters written by defendants, enclosed in plaintiffs' bundle of documents (PBD) pages 8, 11, 13, *viz*; PBD8, PBD11 and PBD13, all signed by one J.M. Baxter, defendants' sales manager. The evidence of second plaintiff is that he had had four or five discussions with Mr. Baxter and Mr. Chong On Ming, defendants' sales representative at Sandakan in second plaintiffs's Sandakan office, the equipment was to be on hire purchase over 24 monthly instalments.

I heard elaborate arguments from Mr. Norbert Yapp and also from Mr. Teh Boon Eng, leading Counsel for plaintiffs on the admissibility or otherwise of PBD8, PBD11 and PBD13. I think I can use for my guidance a passage in the same case *Arnold* (*supra*) at 23:

> The shutting out of a 'subject of litigation' - a power which no Court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule.

With respect, as found by B.T.H. Lee, J, "there is an issue to be tried on allegation of fraud" with which, with respect, I agree and I admitted PBD8, PBD11 and PBD 13.

In support of the allegation of fraud plaintiffs tendered 5 of the 19 agreements. I admitted the 5 agreements as P1 to P5.

In support of the allegation of fraud part of plaintiffs' case is that the equipment mentioned in PBD8, PBD11 and PBD13 are mentioned in P1 to P5. It turned out, however, that none

ofthe equipment mentioned in PBD8, PBD11, PBD13 is mentioned in P4, the evidence of second plaintiff is "Equipment in P4 not mentioned in PBD8, PBD11, PBD13". P4 thus became a *non est factum*. Thus it remains part of plaintiffs' case that:

(1) the equipment mentioned in PBD8 is mentioned in P2;

(2) the equipment mentioned in PBD11 is mentioned in P1 and in P3;

(3) the equipment mentioned in PBD13 is mentioned in P5.

Mr. Yapp contended that of the three letters only two, i.e. PBD8 and PBD13 referred to "hire purchase terms", PBD11 did not refer to any hire purchase and PBD8 and PBD13 which referred to "hire purchase terms" were both addressed to Southern Timber Contractor. Mr. Yapp reiterated that there was thus no "hire purchase terms" offered to first plaintiffs. Mr. Yapp further reiterated that PBD11 which was addressed to first plaintiffs did not refer to any hire purchase. Second plaintiff's answer was:

> Yes. But I am the sole proprietor of Southern Timber Contractor, this means the letter was addressed to me.

Mr. Yapp also pointed out that paragraph 1, PBD8, refers to a discussion between Mr.J.M. Baxter and Mr. Khoo Ghek Teng and Mr.Chan Kay Chun, second plaintiff was not present and if I may reproduce the relevant evidence of second plaintiff.

S. From this letter you were not present at the discussion,how can you say you discussed with Mr. Baxter?

J. The two staff of mine, we discussed the matter according to my principle.

S. What you mean by that?

J. The discussion between my staff and Mr. Baxter was just to confirm the transaction agreed by myself and Mr. Baxter in the previous discussion, previous meeting.

S. I put it to you you are lying?

J. No.

S. PBD8 in relation with Southern Timber Contractor, nothing to do with the agreement between Southern Estate and defendants?

J. No.

S. PBD13 dated 10 July 1967 from defendants to Southern Timber Contractor, agree to Southern Timber Contractor not to Southern Estate?

J. Yes. But I am the sole proprietor of Southern Timber Contractor, this means the letter was addressed to me.

S. As far as defendants were concerned PBD13, PBD8, offers to Southern Timber Contractor not to Southern Estate?

J. Defendants' offer was made to me.

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S. Southern Timber Contractor is a different company, not Southern Estate?

J. I do not think so, because I am a partner of Southern Estate which the other partner is my wife and I am the sole proprietor of Southern Timber Contractor. So whatever agree-

ment entered into between these two companies and defendants could be deemed as agreement entered between myself and defendants. Furthermore, when they requested me to sign the memorandum of charge (both Mr. Teh, Mr. Yapp, agree witness is referring to para. 11 of statement of claim) I signed it without thinking any further as both the Southern Estate and Southern Timber Contractor belong to me."

Mr. Yapp also put it to second plaintiff that in the past second plaintiff had had experience entering into a hire agreement with defendants, D1 dated 14 November 1966.

Second plaintiff was asked by his own leading Counsel when he first came to realise the 19 agreements were hire agreements not hire purchase agreements and he gave a somewhat circuituous account:

S. In what circumstances you came to know the 19 agreements in truth and in fact were Hire agreements,not hire purchase agreements?

J. Only in the middle of 1977.

S. How, why?

J. I came to know about this after I received a letter from the Minister of Law, Kuala Lumpur, informing me that I can apply for special leave to the Yang Di Pertuan Agong.

S. This special leave,what were you appealing?

J. I applied for the special leave for this case to be retried as I was not satisfied with the decision made by the Privy Council.

S. Decision of Privy Council in respect of civil suit 199 of 1972?

J. Yes.

S. You thought there was the special leave, you would appeal to the Yang Di Pertuan Agong in respect of the Privy Council decision in civil suit 199 of 1972?

J. Yes.

S. Thinking as you did based on the Minister's letter that there was this procedure by which you could appeal further to the Yang Di Pertuan Agong which you thought was the purpose of the Minister's letter, what did you do?

J. I finally obtained leave from the Yang Di Pertuan Agong after I had filed in seven petitions.

S. So did you appeal again to the Yang Di Pertuan Agong?

J. No, I did not.

S. When civil suit 189 of 1969, civil suit 190 of 1969, both instituted by Tractors Malaysia, this firm called Chong Thain Vun & Co. were solicitors on record for you and Southern Estate?

J. Yes.

S. When you instituted 199 of 1972 who were your solicitors?

J. Shelley Yap & Co.

S. Mr. Chong and Mr. Yap are both now deceased?

J. Yes.

S. This idea you had some special leave to Yang Di Pertuan Agong, did you consult solicitor?

J. Yes.

J. N.H. Chan, Cheang Lee & Ong, Ipoh.

S. Having taken the advice of N.H. Chan, as he then was, you did not proceed further on this special leave?

J. Yes.

S. Did you consult him in respect of the 19 agreements?

J. No. As Chan asked me to bring all relevant documents to his office as he needed ten days to study my case.

S. Did the relevant document include any of the 19 agreements?

J. I did not know how many agreements which I brought to his office.

S. Did he at least look at one of the nineteen?

J. He did see some of the agreements.

S. Did he then explain to you the effect of those 19 agreements?

J. He told me that the 19 agreements were not hire purchase agreements. They were only hire agreements.

S. Prior to being told of this did any of your solcitors advise you or did you seek advice on the agreements?

J. No.

S. You are told these agreements are hire agreements,you thought they were hire purchase agreements, what did you do?

J. I felt surprise and very hard to believe they were not hire purchase agreements.

Second plaintiff was cross-examined:

S. You agree civil suit 189 of 1969, civil suit 190 of 1969, both suits you were represented by the late Mr.Chong Thain Vun, a Senior Counsel?

J. Yes. But I did not give any instruction to him. I engaged him to come to Court to receive judgment only to show respect to the Court.

S. Civil suit 199 of 1972, you were plaintiff, Tractors Malaysia, defendants, you were represented by Mr.Shelley Yap, a senior member of the Bar?

J. Yes.

S. You agree all this while you had the benefit of senior lawyers advising you?

J. Yes. But they only had the knowledge regarding the guarantee signed on 21 November 1968 only.

S. As far as the Minister's letters are concerned, PBD8, PBD11, PBD13, all these were in your possession all along?

J. Yes.

Re-examined:

S. The three letters, PBD8, PBD11, PBD13. You were asked whether all these were in your possession all along, your answer was yes. You will recall the three letters were written in 1967, yesterday you said you had seen these letters at that time, you also said yesterday it was end of August 1977, you discovered these in Brunei, so between 1967 to August 1977 were you aware they were in the custody or possession of any of your companies?

J. It is possible that these three letters were in my Sandakan office but I could not find it.

S. You would have seen these letters in 1967, when did you find them?

J. I found them on 31 August 1977.

Second plaintiff on his own admission had knowledge of PBD8, PBD11, PBD13, in 1967 and he could have informed the late Mr. Chong Thain Vun in respect of suits 189 of 1969, 190 of 1969, and the late Mr. Shelley Yap in respect of suit 199 of 1972, about the three letters *vis-a-vis* the 19 agreements if he was unhappy about the matter.

Second plaintiff also said that when he signed the 19 agreements he did not know they were hire agreements, he believed they were hire purchase agreements in the light of his discussions with defendants, representations by defendants. As regards the signing of the 19 agreements, second plaintiff gave two versions:

(1) During examination-in-chief second plaintiff said:

S. Before the time you executed the 19 agreements were the contents explained to you by anyone?

J. No.

S. PBD6, who witnessed your signing on behalf of Southern Estate Sdn. Bhd.?

J. Mr. Chan Kay Chun, the person in charge of the office in Sandakan.

S. Mr. Chan has passed away?

J. Yes.

(2) During cross-examination second plaintiff said:

S. You agree that before you signed the agreements you had the opportunity either by yourself or your Manager, Mr. Chan, to go through the terms of the agreements?

J. No.

S. You agree that your manager, Mr. Chan, would be conversant with the terms of the agreements if you had requested him to explain them to you?

J. Yes. But when I signed the agreements Mr. Chan was not there yet. He only came to the office after I had signed the agreements. After seeing that I had signed the agreements he put his signature as a witness. Soon after that the clerk of defendant company got the agreements away for Stamp Duty and I was in a hurry to go to the airport to proceed with my journey to overseas.

S. Yesterday when your Counsel asked you who witnessed the signing of the agreements you answered Mr. Chan Kay Chun, the person in charge of your company, now you are saying Mr.Chan did not witness your signing the agreements?

J. When I first signed the agreements Mr. Chan was not there yet. He only reached the office when I was signing the agreements, then he put his signature as a witness.

Thus when it was suggested to second plaintiff that he could well have had Mr. Chan Kay Chun to explain the contents of the 19 agreements to him there was the volte-face on his part, that Mr. Chan arrived later, after he had commenced signing the 19 agreements.

Then there is the letter from defendants' solicitors to first plaintiffs, letter TJ/306/87 dated 28 October 1969(PBD4), referring to the "hire agreements" (third paragraph of the letter) requesting for payment, giving a rebate and second plaintiffs' prompt reply dated 30 October 1969 (PBD6)in endearing terms professing *bona-fides* and promising to make the payments in suits

189 of 1969 and 190 of 1969 which payments were subsequently made as in the judgments in the two suits (*supra*), if I may add after the benefit of the service of the late Mr. Chong Thain Vun, a Senior Counsel.

Was there Fraud, Fraudulent Misrepresentation by Defendants as Alleged by Plaintiffs

Both Mr. Teh and Mr. Yapp submitted at some length with authorities on fraud, whether s. 17, Contracts Act, 1950, which came into force in Sabah only on 1 July 1979 is applicable, whether the English common law is applicable, fraud as referred to in **Bullen and Leake and Jacob's**, 12th Edition, 1975, page 449, on "false representation", "representation must be one of fact", "addressed to the party misled", "representation must induce the contract", "fraudulent misrepresentation", "where maker knew it was false or was reckless whether it was true or not", Malaysian and English cases, on the standard of proof, whether *Saminathan's* case [1981] 1MLJ 121 PC is applicable.

With respect on the evidence before me as a whole, in its totality I find plaintiffs' allegation of fraud,fraudulent misrepresentation against defendants is second plaintiffs' mere averment, oral evidence, vacillatory at times, not borne out,not supported by PBD8,PBD11 and PBD13, plaintiffs' own documentary evidence.

PBD8 and PBD13 the only two letters which refer to "hire purchase terms" with second plaintiff not present at the discussion referred to in PBD8 (first paragraph of PBD8) were not addressed to plaintiffs. As regards the discussion referred in PBD8 (first paragraph of PBD8) second plaintiff said:

J. Mr. Khoo and Mr. Chan were both my staff. They will inform me through phone whatever discussion in this meeting. This letter is just to confirm the terms which I discussed with Mr. Baxter.

S. From this letter you were not present at the discussion, how can you say you discussed with Mr. Baxter?

J. The two staff of mine, we discussed the matter according to my principle.

S. What you mean by that?

J. The discussion between my staff and Mr.Baxter was just to confirm the terms agreed by myself and Mr. Baxter in the previous discussion, previous meeting.

S. I put it to you, you are lying?

J. No.

Perhaps pertinent is what did Mr. Khoo Ghek Teng and Mr. Chan Kay Chun informed second plaintiff. Both did not give evidence. While it is in evidence that Mr. Chan Kay Chun has passed away, there is no evidence as to the whereabouts of Mr. Khoo Ghek Teng, nor explanation why he was not called to give evidence in respect of PBD8, a crucial part of the case for plaintiffs.

It may be well for second plaintiff to say he is Southern Estates Sdn. Bhd. (first plaintiffs) and first plaintiffs is him, to say he is Southern Timber Contractor and Southern Timber Contractor is him, he is also the sole-proprietor of a Tatau Timber Company and by the same argument to say he is Tatau Timber Company and Tatau Timber Company is him,but second plaintiff must know that first plaintiffs, Southern Timber Contractor and Tatau timber Company too are each a separate entity and if I may say so with respect a person, natural person, firm or company, any party dealing with second plaintiff should not have to be faced with any fluid or erratic stance by second plaintiff. With respect a party if I may say so

particularly in the business community, in the commercial community must know with clarity, with certainty with whom the party is dealing with, negotiating with and finally enter into an agreement, a contract.

The evidence of Mr. N.H.Chan, as he then was, now Y.A. Dato' N.H. Chan, Judge Court of Appeal Malaya, according to second plaintiff, "He told me that the 19 agreements were not hire purchase agreements. They were only hire agreements", as being the first time second plaintiff realised the 19 agreements were hire agreements, "only in the middle of 1977", is of course hearsay.

With respect by whatever standard of proof, beyond reasonable doubt or on a balance of probabilities, plaintiffs have not discharged the burden, the onus of proof, and with insufficient evidence plaintiffs must fail, *International Times* [1980] 2 MLJ 86 FC.

I accept Mr. Yapp's submission of no case to answer. Plaintiffs' suit is dismissed with costs.